

SERVICE DATE - LATE RELEASE AUGUST 21, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY—CONSTRUCTION AND OPERATION  
EXEMPTION—MEDINA COUNTY, TX

Decided: August 21, 2003

In a decision served on May 19, 2003 (May 19 decision),<sup>1</sup> the Board addressed transportation-related issues and tentatively granted, subject to later consideration of the environmental impacts, an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for the Southwest Gulf Railroad Company (SGR) to construct and operate an approximately 7-mile line of railroad in Medina County, TX. The proposed line would extend from Vulcan Construction Materials, LP's (Vulcan Construction)<sup>2</sup> proposed quarry in the north central part of the county to a connection with the Del Rio Subdivision of Union Pacific Railroad Company at approximately milepost 250 near Dunlay. The May 19 decision stated that, upon completion of the environmental review, a further decision would be issued addressing the environmental impacts of the proposal and whether to authorize the construction.

On May 23, 2003, Medina County Environmental Action Association (MCEAA) filed a petition to revoke the conditional exemption. On June 9, 2003, SGR replied.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), an exemption may be revoked, in whole or in part, when application of the Board's regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The burden of proof is on the petitioner, who must articulate reasonable, specific concerns under the revocation criteria. See The Elk River Railroad, Inc. — Construction and Operation Exemption — Clay and Kanawha Counties, WV, Finance Docket No. 31989 (STB served Apr. 11, 1997). Because MCEAA has not met its burden of proof, its petition will be denied.

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<sup>1</sup> Notice was published in the Federal Register on May 19, 2003 (68 FR 27141).

<sup>2</sup> Vulcan Construction is a subsidiary of Vulcan Materials Company (Vulcan Materials), which is affiliated through common ownership with SGR. Vulcan Materials is a producer of aggregate, composed primarily of crushed stone, sand, and gravel.

MCEAA makes three arguments in support of its petition for revocation. First, MCEAA contends that proper public notice of the proposal was not given in accordance with 49 CFR 1150.10. Second, MCEAA argues that the conditional exemption should be revoked because there is as of yet no quarry for the proposed rail line to serve and, thus, no current need for rail service. Finally, MCEAA raises various environmental concerns.<sup>3</sup>

Notice. MCEAA argues that proper notice was not given because there was no local publication in a newspaper, citing the Board's rules at 49 CFR 1150.10. The specific rule that MCEAA refers to, at 49 CFR 1150.10(f), pertains to applications for construction, acquisition or operation of railroad lines under 49 U.S.C. 10901. However, in this case, SGR filed a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901. Rules governing petitions for exemption are set out at 49 CFR 1121, and do not require publication of a notice in a local newspaper in a rail construction case. Instead, the Board's practice in many construction cases is to issue a decision addressing the transportation-related issues, and, where appropriate, find, subject to later consideration of environmental impacts, that the proposal meets the exemption standards of 49 U.S.C. 10502. That conditional exemption is then published in the Federal Register assuring notice to the public. Petitions to reopen may be filed, as was filed here, and a final decision is not issued until the environmental review process is completed. Construction may not begin until a final decision is issued and becomes effective. Thus, even without local newspaper publication, this process gives adequate notice and an opportunity for the public to address all aspects of the proposed construction.

Need for rail service. According to MCEAA, there is no need for the proposed rail line because neither Vulcan Materials nor any of its subsidiaries has acquired the land for the proposed quarry, and none of the required permits for the proposed quarry have been obtained.<sup>4</sup> SGR argues that these contentions are incorrect, but in any event, are not grounds for revoking the conditional exemption. SGR asserts that Vulcan Materials' subsidiaries have acquired much of the land necessary for the quarry, and have been in consultation with the U.S. Fish and Wildlife Service. SGR also states that it will comply with all permitting requirements for the

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<sup>3</sup> These concerns include: locating the rail line in a floodplain; allegations related to public health and safety; and potential adverse effects on historic sites.

<sup>4</sup> Specifically, MCEAA asserts that SGR has not been issued a permit for the quarry by the U.S. Fish and Wildlife Service and has not been issued the required permits for a rock crusher by the Texas Commission on Environmental Quality. MCEAA also questions the need for the proposed quarry. Finally, MCEAA states that several landowners have entered into restrictive covenants to prevent rail activity on their property.

quarry.<sup>5</sup> In the May 19 decision, the Board acknowledged that Vulcan Construction is still in the process of developing the quarry. Applications and petitions for exemption for the construction and operation of rail lines to facilities that are not yet fully developed and operational have been approved in the past. See, e.g., East Cooper and Berkeley Railroad — Construction and Operation Exemption — In Berkeley County, SC, Finance Docket No. 23704 (ICC served Dec. 13, 1995). The fact that the quarry does not yet exist, or that necessary permits for the quarry have not yet been obtained, are not grounds for revoking the exemption.

Environmental issues. The Board's Section of Environmental Analysis (SEA) is currently conducting an environmental review of SGR's proposal. Either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) will be prepared. As part of the environmental review process, SEA will consider all of the environmental issues raised by MCEAA, and there will be ample opportunity for public review and comment on all environmental issues and any mitigation recommended by SEA when the Draft EA or Draft EIS is issued. After the environmental review is completed, the Board will issue a further decision addressing the environmental issues and making the exemption effective at that time, if appropriate, subject to environmental mitigation conditions, if necessary. Moreover, no construction can begin until the Board's final decision is issued and has become effective. In these circumstances, no need has been shown to revoke the conditional exemption because of potential environmental issues.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to revoke the conditional exemption for construction and operation is denied.

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<sup>5</sup> As to the need for the proposed quarry, SGR submits that Vulcan Materials is confident that there is a market for the aggregate that will be derived from the quarry. SGR also submits that development of the quarry by Vulcan Materials is a business decision. As far as restrictive covenants are concerned, SGR asserts that these matters can be addressed later, should the Board grant a final exemption for construction of the line.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary